

1747. February 24.

COCHRANS *against* COUTS.

WILLIAM COCHRAN of Fergullee let his real estate descend in course of law to John his eldest son, and disposed to him his moveables, under the burden of certain provisions to his younger children, particularly of 5000 merks Scots to each of Bethia and Jean his two daughters.

John confirmed himself executor to his father, giving up in inventory, at different times, such sums as he found necessary in order to recover them; but the whole inventory did not equal the provisions to the children, though it was alleged that the moveable estate intromitted with by him was of greater extent; and the Lords did not think it incumbent on the daughters to prove intromission beyond the inventory, nor to what amount, in this process, their father having died so long ago as 1721.

John paid his brothers their provisions, and his sisters the interest of theirs; and dying, was succeeded by William his brother, having sold part of the estate; and William granted a wadset of the remainder for his own pre-contracted debts to John Blackwood and John Cathcart of London, merchants, excepting a house and garden in Paisley, and a piece of land called Serjeant's Acre; and on this wadset an adjudication was led; which right came into the person of John Coutts merchant in Edinburgh. Mr Coutts raised a process of ranking and sale of his debtor's estate, which was cast, as not containing the whole, to wit, the parcels not contained in his wadset and adjudication.

After this William Cochran granted to his two sisters an heritable bond on the Serjeant's Acre and house in Paisley, for security to them of their provisions, whereon they were infest; and Mr Coutts having led a new adjudication, comprehending these subjects, raised a new ranking and sale, in which they appeared, craving to be preferred upon their infestment; and the LORD ORDINARY, 26th November 1746, preferred them accordingly; but, upon representation and answers, 23d January 1747, 'Having considered, that the heritable bond by Fergullee to his sisters was granted after the diligence of his other creditors, and that the creditors were in possession of his estate, and had raised a sale, and proven the rental thereof; therefore reduced the heritable bond at the instance of these anterior creditors.'

*Pleaded* in a reclaiming bill, That the only diligence standing against William Cochran, when he granted the security in question, was a horning, upon a decret of mails and duties used against him, for the rent of part of the estate possessed by him, whereon he was denounced at the market-cross of Edinburgh, without the jurisdiction where he resided; which horning could only be the foundation of a caption, but could not affect any future conveyance of his estate, either real or personal, Stair, p. 746, 28th March 1707. Gordon against Duff of Dipple, (*infra b. t.*); neither were the creditors in possession of the subjects wherein the petitioners had their infestment, as they were not contained in the adjudication.

No 70.

It was held to be fraudulent in a debtor to give a partial preference over a part of his estate, omitted out of an adjudication affecting the greatest part of it; and after a process of sale.

No 70.

*Answered*, That the petitioners were not onerous creditors either of John or William Cochrans, as their father had only burdened his moveables with his childrens provisions, which appeared by the testament to come far short of the provisions already paid to the other children; that William Cochran a bankrupt, whose estate, bating this small parcel, was adjudged, and a sale thereof raised, but which process was stopt only as not containing the whole estate, ought not to have caught the opportunity of giving a preference to his sisters, gratuitous creditors of his, before another adjudication could be got expedite; that the statute 1621 was intended to follow after, and practice the good and commendable laws, civil and canon, made anent fraudulent alienations; and by the civil law, the *actio pauliana* was competent for the recovery of all effects alienated *post missionem in possessionem*, and of all alienated fraudulently *ante missionem*, providing the action were brought within year and day of the deed quarrelled, *l. 1. in pr. l. 9. § 10. in pr. ff. de his que in fraudem*; that in this case the fraud was evident, and the pursuer had obtained sequestration, and brought his action of sale of the whole subject in less than a year from the granting the bond.

*Observed* on the Bench, That though this case fell not under the sanction of the acts 1621, or 1696, yet that a debtor giving a partial preference over a part of his estate, omitted out of an adjudication affecting the bulk thereof, and after a process of sale, which for that reason could not be proceeded in; and when the creditors were in possession of all but the omitted particle, might be construed to have acted *mala fide*, and the deed perhaps so far set aside, that however such a determination were given, as it behoved solely to be founded on considerations of equity, so it could be extended no further than equity required, to wit, not to annul the security, by which means creditors who had done diligence posterior thereto, might come to be preferred; but to allow the whole creditors the benefit thereof: But then it was not equitable to allow this benefit to the present pursuer, who had himself obtained a partial preference on the bulk of the estate, to the exclusion of the whole other creditors; that if the civil law were to be applied, it behoved to be considered, that by it the creditors, upon a sufficient estate, to which a bankrupt succeeded, could obtain from the *prator* a *separatio bonorum*; and, in reality, equity required that the security given on the estate in favour of William's anterior creditors should be set aside, to make way for the payment of the creditors of his predecessor, who left sufficient to satisfy them.

THE LORDS altered the second interlocutor of the Ordinary, and adhered to the first.

Act. Blackwood.

Alt. W. Grant.

Clerk, Justice.